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In the Supreme Court of the United States

OCTOBER TERM, 1993

ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND D/B/A TULANE MEDICAL CENTER HOSPITAL AND CLINIC, ET AL.,

Petitioners,

v.

DONNA E. SHALALA, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE AMERICAN HOSPITAL ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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INTEREST OF THE AMICUS CURIAE

The American Hospital Association ("AHA") is the primary national membership organization for hospitals in this country, consisting of approximately 5,400 hospitals and other health care institutions. The AHA's goal is to promote high-quality health care and health services for all through leadership and assistance to hospitals in meeting the health care needs of their communities.

The AHA has a substantial interest in the outcome of this case. Many of its members are teaching hospitals eligible for Medicare reimbursements under the Graduate Medical Education program. The reaudit regulation of the Secretary of Health and Human Services, at issue here, significantly and unfairly compromises these hospitals' ability to provide medical services generally and high-quality medical education in particular. The AHA and its members also have a substantial interest in receiving a dispositive and expeditious judicial determination of the Secretary's reauditing authority -- regardless of the outcome -- because of the vast resources currently being expended by teaching hospitals in litigating the Secretary's reauditing authority before the Provider Reimbursement Review Board, and because of the expected volume of federal court litigation on this issue in the future.

Finally, the AHA and its members -- whether teaching hospitals or not -- have an interest in this litigation because of the potentially dangerous precedent set by the reaudit regulation here at issue. It is of paramount importance to the AHA that the Secretary recognize that the Department's responsibility for promulgating wide-ranging health care regulations does not, and cannot, permit the revisitation of final departmental decisions upon which hospitals have long relied.

In recognition of the AHA's interest in the resolution of the question presented, both parties have consented to the filing of this brief.

STATEMENT

Under the Medicare program, the Department of Health and Human Services ("HHS") annually reimburses teaching hospitals for a portion of their reasonable graduate medical education ("GME") costs. Before 1986, these reimbursement amounts were determined through annual audits of GME cost data undertaken by fiscal intermediaries designated by HHS. For example, reimbursement determinations regarding fiscal

year ("FY") 1984 were based on audits conducted on hospitals' FY 1984 cost data, and notices of program reimbursements ("NPRs") for FY 1984 were issued by HHS thereafter. NPRs for FY 1984 that went unchallenged by the hospital, and were not reopened by HHS, became "final and binding" three years after they were issued. 42 C.F.R. § 405.1807. Moreover, as of the end of FY 1988, hospitals were no longer under any legal obligation to retain documentation related to FY 1984 cost data. See 42 C.F.R. § 405.481(g)(3) (requiring hospitals to retain physician allocation agreements and time records for a period of four years after the close of a cost reporting year).

In 1986, Congress enacted 42 U.S.C. § 1395ww(h)(2)(A), which provides that a hospital's GME reimbursements for years beginning after July 1, 1985 shall be based on the amount of the hospital's GME costs for FY 1984 that are "recognized as reasonable under this subchapter."[1] HHS did not promulgate regulations implementing this statute until 1989, when the Secretary of HHS authorized the Department's fiscal intermediaries to *reaudit* hospitals' FY 1984 cost data for purposes of determining post-1984 GME reimbursements. 42 C.F.R. § 413.86(e)(1)(ii)-(iii) ("the Reaudit Regulation"). This regulation permits HHS to revisit its GME cost determinations for FY 1984 even though these determinations have in most cases become "final and binding" under 42 C.F.R. § 405.1807, and even though hospitals have long been under no legal obligation to retain the records relevant to

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[1] Under the statute, a hospital's GME reimbursement is determined by dividing the amount of reasonable GME costs for FY 1984 into the number of full-time equivalent residents in an approved medical residency training program during that year. This quotient is adjusted yearly for inflation and multiplied by a hospital's current number of residents to yield the payment amount for a given post-1984 year.

these determinations. Furthermore, in implementing the Reaudit Regulation, HHS is seeking the production of records that were not required, and therefore may not have been kept with the utmost care, at the time of the initial FY 1984 audit.

A GME provider may contest the results of a reaudit, as well as the Secretary's general reaudit authority, before the Provider Reimbursement Review Board ("PRRB"), and subsequently in the federal district courts. 42 U.S.C. § 1395oo(f)(1). There are currently 504 cases pending before the PRRB challenging reaudit determinations, all of which may also raise the issue of the Secretary's general reaudit authority. In this case -- the first challenge to the Reaudit Regulation to reach the federal courts -- the court of appeals, reversing the district court, determined that the regulation did not contravene the governing Medicare statute, given (1) the ambiguity of the statutory provision establishing FY 1984 costs as the benchmark for subsequent GME entitlements, and (2) the reasonableness of the Secretary's interpretation of this provision. Pet. App. 1a-17a.

ARGUMENT

The American Hospital Association submits that review of the court of appeals' decision by this Court is essential for a number of reasons. First, that decision is plainly wrong and rests on a thorough misinterpretation of the Medicare statute. Second, this case presents a question of immense significance to hundreds of the nation's teaching hospitals, which will be seriously and unfairly affected by the illegal reaudits. Finally, an immediate and definitive judicial resolution of this important matter is necessary -- regardless of the ultimate outcome -- to forestall the massive waste of resources that will result from litigation both of the Secretary's general reaudit authority and of the merits of individual reaudit determinations.

I. REVIEW IS WARRANTED BECAUSE THE COURT OF APPEALS ERRED IN CONSTRUING 42 U.S.C. § 1395ww(h)(2)(A) TO AUTHORIZE THE REAUDIT REGULATION

The D.C. Circuit decided this case by applying the test set forth in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 842-844 (1984), for examining an agency's construction of its governing statute (Pet. App. 7a-8a). The court of appeals erred, however, in concluding that the language of the Medicare statute was sufficiently ambiguous to indicate that Congress had not spoken directly to the precise question at issue. As the Petition for a Writ of Certiorari persuasively explains, the plain language of 42 U.S.C. § 1395ww(h)(2)(A) cannot sustain the Reaudit Regulation.

First, because this statutory provision directs the Secretary to base GME reimbursements on her calculation of "the amount [of GME costs] recognized as reasonable *under this subchapter*" for FY 1984 (emphasis added), the processes set forth *in the Medicare statute* -- that is, the initial FY 1984 audits authorized under 42 U.S.C. § 1395oo(a) -- provide the exclusive means of computing these costs. The Medicare statute therefore expressly precludes other methods of computing GME costs, including the reaudits authorized by the Secretary.

Second, consistent with its exclusive reliance on the auditing procedures contained in 42 U.S.C. § 1395oo(a), the GME provision does not authorize the Secretary to reaudit FY 1984 cost data. The statute's failure to confer such authority with respect to FY 1984 GME costs -- the numerator in the GME reimbursement equation -- stands in stark contrast to the statute's express grant of authority to establish rules "for the computation of the number of full-time-equivalent residents in an approved medical residency training program" in FY 1984 (42 U.S.C. §

1395ww(h)(4)(A)) -- the denominator in the GME reimbursement equation. Clearly, Congress recognized no need, and evinced no desire, for reaudits that would undercut or replace the established cost determination procedures found in 42 U.S.C. § 1395oo(a).

Third, the Secretary's reading of the statutory language is inconsistent with her own, and the courts', treatment of identical language in the Medicare statute. The phrase "costs * * * recognized * * * under this subchapter" appears in several other statutory provisions that use base year cost data to determine Medicare reimbursements. See, *e.g.*, 42 U.S.C. §§ 1395ww(a)(1)(C) & 1395ww(b)(3)(A)(i). In these contexts, the Secretary has consistently "recognized" those base year costs that have been adopted as part of a final cost determination under 42 C.F.R. § 405.1807. In the one instance when the Secretary attempted to disturb final base year cost determinations, the courts blocked this effort as contrary to the statute. *Georgetown Univ. Hosp.* v. *Bowen*, 862 F.2d 323, 327 (D.C. Cir. 1988). The Secretary's construction of Section 1395ww(h)(2)(a) thus conflicts with the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Sullivan* v. *Stroop*, 496 U.S. 478, 484 (1990) (construing other chapters of the Social Security Act) (internal quotations omitted).

The foregoing analysis reveals that the Medicare statute unambiguously denies the Secretary the authority to reaudit final GME cost determinations. The court of appeals' conclusion that the Reaudit Regulation passes scrutiny under the first prong of the *Chevron* test is therefore erroneous.

Moreover, the Secretary's reading of 42 U.S.C. § 1395ww(h)(2)(A) is manifestly unreasonable, and therefore -- contrary to the court of appeals' conclusion -- fails the second prong of the *Chevron* test as well. To begin with, the Reaudit Regulation has resulted in the determination of allowable

GME costs in a manner that directly contravenes the governing statutory provision. Because the prescribed period for the retention of FY 1984 GME cost data has expired, and because the Secretary is now placing emphasis on data that were not kept in 1984, it has become impossible to establish GME entitlements with *any* accuracy on the basis of FY 1984 data.[2] Realizing these difficulties, the Secretary has authorized reaudits to proceed on the basis of GME cost data for years *subsequent to FY 1984*. Indeed, the majority of hospitals -- including each of the six petitioners in this case -- have been reaudited on the basis of data from years other than FY 1984, in direct contravention of the statutory directive that GME costs be determined on the basis of *FY 1984* figures. A statutory interpretation that repeatedly and inevitably requires an agency to disregard express directions contained in its governing statute simply cannot be sustained as reasonable.[3]

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[2] For example, the government is now asking hospitals to provide physician allocation agreements showing -- by half-hour increments -- the amount of time teaching physicians devoted to GME-reimbursable activities in FY 1984. "The level of detail required in 1983 for physician time studies did not anticipate such a rigorous use of the data." Marybeth Burke, *Teaching Hospitals Brace For Huge GME Payment Losses*, Hospitals (July 5, 1990) ("Hospitals") 36, 40 (comments of Alden Solovy, Manager, Premier Hospitals Alliance, Inc., Westchester, Ill.). Consequently, even if they still exist, the FY 1984 cost data are insufficient evidence of GME entitlements under the Secretary's new methodology.

[3] In upholding the Secretary's authority to issue the Reaudit Regulation, the D.C. Circuit observed that "it is 'hard to believe that Congress intended that misclassified and nonallowable costs continue to be recognized through the GME payment indefinitely.'" Pet. App. 9a. This observation is misguided for a number of reasons. First, there is no reason to assume that NPRs for FY 1984, which the Secretary allowed to become "final and binding,"

The Reaudit Regulation is also unreasonable because it violates without congressional warrant settled principles of administrative *res judicata*, allowing the Secretary to revisit "final" determinations of allowable GME costs reached under 42 C.F.R. § 405.1807. Such final determinations are precisely the kinds of administrative actions that are entitled to *res judicata* effect and that cannot be disturbed. See *Astoria Federal Sav. & Loan Ass'n* v. *Solimino*, 111 S. Ct. 2166, 2169 (1991); *United States* v. *Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966). Although Congress never declared its intention to abrogate these longstanding principles in the context of GME reimbursements, the Reaudit Regulation completely robs GME providers of the repose that the prevailing system was designed to provide.[4] It is simply irrational to assume, as did the court of appeals, that

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contain substantial amounts of misapplied and nonallowable costs. Second, the court failed to recognize that only by reauditing cost data from years *other than FY 1984* -- in direct contravention of the statute -- would it be possible for HHS in many cases to try to obtain a more accurate calculation of allowable GME costs. Certainly, reauditing of the *FY 1984* cost data *after* expiration of the applicable recordkeeping period would result in a *less* accurate determination of costs than would the initial FY 1984 audit. Indeed, the general prospect of reduced accuracy in reimbursement determinations explains the Secretary's decision to impose a three-year reopening period on reimbursement decisions in the first place. See *Board of Regents of the Univ. of the State of New York* v. *Tomanio*, 446 U.S. 478, 487 (1980) (approving generally of statutes of limitations because "there comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely * * * to impair the accuracy of the fact finding process * * *").

[4] As petitioners note (Pet. 24-25), there is absolutely nothing in the Reaudit Regulation to prevent HHS from undertaking a second, or third, or fourth, reaudit if the results of the first reaudit are "unsatisfactory." Indeed, there is nothing in the regulation that prevents reaudits from continuing indefinitely into the future.

Congress intended the Secretary to revisit "final and binding" reimbursement decisions, in contravention of her own reopening standards, absent some clear statement to that effect.

In sum, the Secretary's Reaudit Regulation cannot stand under either prong of the *Chevron* test. Review by this Court is necessary to correct the court of appeals' error.

II. REVIEW IS ALSO WARRANTED BECAUSE OF THE IMPORTANCE OF THIS ISSUE TO HUNDREDS OF TEACHING HOSPITALS

The harmful effect of the court of appeals' erroneous decision on the nations' teaching hospitals cannot be gainsaid. More than 800 teaching hospitals -- two-thirds of all hospitals affected by the 1985 legislation -- have been reaudited. As previously noted, there are already over *500* cases pending in the PRRB challenging the Secretary's reaudit determinations, at least several of which were filed as group appeals and therefore concern more than one hospital. The government acknowledged during oral argument in the court of appeals that the cumulative amount of money at stake in these proceedings is approximately *one billion dollars*. Indeed, this estimate may well be low, given that any decrease in allowable GME costs resulting from reaudits will affect reimbursements for *each year* subsequent to 1984. The government itself has recognized the importance of this case, noting that it "affect[s] many Medicare hospitals across the country." Secretary's September 8, 1992 court of appeals filing at 3.[5]

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[5] The severe effect of the Reaudit Regulation on the six petitioner hospitals is illustrative. As a result of the regulation, these hospitals stand to lose approximately $2.6 million in Medicare reimbursements *annually*. Petitioner George Washington University Hospital alone will suffer an annual decrease in GME reimbursements of approximately $1.3 million.

Each individual case before the PRRB involves hundreds of thousands, if not millions, of dollars that in the absence of the Reaudit Regulation would go toward reimbursing a teaching hospital for GME costs and maintaining the high standards of medical education and service that America's teaching hospitals, with the government's help, have heretofore achieved. It is no exaggeration to state that by authorizing reaudits that will produce the benchmarks for all future GME reimbursements, the Secretary has significantly hindered these hospitals' ability to provide quality medicare services. As one hospital administrator has noted, "[the Reaudit Regulation] will cost us a lot of money, money we don't have." Hospitals, *supra*, at 36 (comments of Ronald Ruppel, senior vice-president of corporate affairs and chief financial officer, Jackson Memorial Hospital, Miami, Fla.).

Even if teaching hospitals *are* able to maintain the quality of their GME programs in spite of the Reaudit Regulation, the adverse impact of the Secretary's actions will nonetheless be felt. For every dollar of GME costs wrongly withheld by the government, there will be one dollar that teaching hospitals need to obtain from other sources. This burden will likely fall on the hospitals' non-Medicare patients. Thus, the Reaudit Regulation stands to affect not only teaching hospitals, but also the public at large, and to contribute further to rising health care costs in this country.

These effects are not only significant; they are also manifestly and fundamentally unfair. When the Secretary promulgated the Reaudit Regulation in 1989, teaching hospitals were already acting in complete reliance on the initial audits of FY 1984 cost data, which, as of Congress' enactment of 42 U.S.C. § 1395ww(h)(2)(A) in 1986, had become the legally recognized benchmark for all future GME reimbursements, and which as of 1988-89 had provided the

basis for "final" NPRs under 42 C.F.R. § 405.1807. Resources were being committed based on expected reimbursement rates, and FY 1984 cost data -- no longer subject to the Secretary's recordkeeping requirements -- were being destroyed. Now the Secretary seeks to revisit these final determinations, at considerable cost to teaching hospitals -- which, lacking the documentation needed to contest the reaudits, find themselves unable to challenge the government's determinations effectively -- and to the public at large. It is obvious that reaudits under these circumstances are contrary to the most basic notions of fairness.[6]

The court of appeals' erroneous decision upholding the Reaudit Regulation clearly works a severe and unfair hardship on the nation's teaching hospitals and creates a dangerous precedent for health care providers. Accordingly, review by this Court is necessary.

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[6] Even though HHS has attempted to account for the destruction, or insufficiency, of FY 1984 data by authorizing reaudits of cost data from *other* fiscal years (contrary to the express requirement of the statute), the Reaudit Regulation still imposes an extreme burden on hospitals, making responses to the reauditing determinations difficult and expensive. First, under the new reaudit system, hospitals must assemble "staggering" amounts of data (see Hospitals, *supra*, at 40 (comments of Thomas Gentile, director of medical education, Providence Hospital, Southfield, Mich.)), a process that is costly and difficult even if the materials exist. Second, hospitals must provide records that have never before -- not in FY 1984 or in any other year -- been used by the Secretary as part of her reimbursement methodology (such as resident and intern rotation schedules). Because this information was not previously required, it may not have been kept with the utmost degree of care.

III. IMMEDIATE REVIEW IS ESSENTIAL TO THE EFFECTIVE ADMINISTRATION OF THE MEDICARE SYSTEM

Throughout the course of this litigation, both the parties and the courts have consistently recognized the need for immediate resolution of any legal challenges to the Secretary's reauditing authority. For example, the government specifically referred in the court of appeals to "the parties' awareness that the issues in this case should be resolved as quickly as possible * * *." Secretary's September 8, 1992 court of appeals filing at 3. Consistent with these sentiments, the proceedings in the district court and the court of appeals were expedited.

This emphasis on expedition was well-founded and militates in favor of this Court's grant of review. Absent a swift and authoritative resolution of the validity of the Reaudit Regulation, the Medicare reimbursement machinery will be plunged into an administrative quagmire that will swallow the resources of parties, courts, and GME administrators alike. This Court has frequently granted certiorari in cases raising issues of great importance to the administration of federal laws.[7] This case demands similar attention.

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[7] See, *e.g.*, *Pinter* v. *Dahl*, 486 U.S. 622, 632 (1988) ("Because of the importance of the issues involved to the administration of the federal securities laws, we granted certiorari"); *National Broiler Marketing Ass'n* v. *United States*, 436 U.S. 816, 820 (1978) ("Because of the importance of the issue * * * for the administration of the antitrust laws, we granted certiorari"); *Commissioner of Internal Revenue* v. *Estate of Noel*, 380 U.S. 678, 680 (1965) ("Because of the importance of an authoritative answer to these questions in the administration of the estate tax laws, we granted certiorari * * *"); *Carroll* v. *United States*, 354 U.S. 394, 396 (1957) ("We granted certiorari * * * because of the importance of th[e] question * * * to the administration of the federal criminal laws"); *Marcello* v. *Bonds*, 349 U.S. 302, 305 (1955) (granting

Without immediate review by this Court of the court of appeals' decision, a massive waste of resources is inevitable *regardless of whether the court of appeals reached the correct result in this case*. If, as AHA believes, the D.C. Circuit erred in upholding the Secretary's reaudit authority, countless time and money will be spent litigating for naught before the PRRB, the federal district courts and the federal courts of appeals the merits of the Secretary's reaudit determinations. As noted above, there are currently *more than 500* such cases pending before the PRRB. Massive waste will result not only from the kinds of expenditures of resources that are inherent in administrative and judicial litigation generally, but also from the particular problems of proof that would accompany these cases: cost data from fiscal year 1984 will have been destroyed, and the passage of time will have resulted in staff turnover and in the fading of the hospitals' institutional memories. Immediate review and invalidation of the

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certiorari "to resolve issues having a significant bearing on the administration of our immigration laws"); *United Constr. Workers* v. *Laburnum Constr. Corp.*, 347 U.S. 656, 658 (1954) ("Because of the importance of the jurisdictional issue * * * to the administration of the Labor Management Relations Act, we granted certiorari * * *"); *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146, 150 (1946) ("The case is here on a petition for a writ of certiorari which we granted because of the importance of the problem in the administration of the postal laws"); *Sola Elec. Co.* v. *Jefferson Elec. Co.*, 317 U.S. 173, 175 (1942) ("We granted certiorari * * *, the question being of importance to the administration of the patent laws and the Sherman Anti-Trust Act"); *United States* v. *Santa Fe Pac. R.R.*, 314 U.S. 339, 344 (1941) ("We granted the petition for certiorari because of the importance of the problems raised in the administration of the Indian laws and the land grants").

Secretary's Reaudit Regulation would preclude this highly undesirable prospect.[8]

Even if the court of appeals in this case *was* correct, this Court's failure to definitively resolve the reauditing issue now will nevertheless result in a massive waste of scarce resources. All of the 500-plus cases currently before the PRRB are likely to raise the issue of the Secretary's reauditing authority. These challenges will inevitably reach the district courts and the regional courts of appeals. 42 U.S.C. § 1395oo(f)(1). It seems equally inevitable, in light of the complexity of the issue and the strong arguments against the validity of the Secretary's regulation, that the circuits will reach inconsistent results. Because the PRRB cases are at an embryonic stage, however, a conflict in the circuits is not likely to develop for several years;[9] in the meantime, thousands of hours and millions of dollars will have been spent litigating this question. It is certainly preferable for this Court to grant review *now*, and to spare the lower federal courts, HHS and the teaching hospitals the enormous burden and expense of confronting the issue, than to wait until repeated litigation has produced -- as it unquestionably will -- a division among the circuits years hence.[10]

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[8] Invalidation of the Reaudit Regulation also would eliminate the need to litigate numerous other legal challenges to the Secretary's new methodology. See Hospitals, *supra*, at 38.

[9] The first of the PRRB hearings is expected to commence in late 1993. Decisions in these proceedings are not expected for several months. Thus, the federal district courts will not begin to hear these cases until 1994-1995, and the federal courts of appeals not until the end of this decade.

[10] By the same token, the practical consequences of invalidating the Reaudit Regulation years from now would be far more severe than they would be today. The Secretary would be forced to

In this respect, this case is analogous to *United States* v. *Standard Oil Co.*, 332 U.S. 301 (1947), in which the Court considered whether the government could recover from those committing torts against military personnel the amounts expended by the government for hospitalization and compensation. The Court granted certiorari in that case "because of the novelty and importance" of this question, *id.* at 302, noting that "upwards of 450 instances of negligently inflicted injuries upon soldiers of the United States, requiring hospitalization at Government expense, and the payment of compensation during incapacitation, have been reported [to the Department of Justice], * * * that additional instances were being reported * * * at the rate of approximately 40 a month," and that "[t]he suit * * * was * * * representative of a number already commenced * * *." *Id.* at 302-303 n.2 (internal quotations omitted). This Court should recognize in this case, as it did in *Standard Oil*, that immediate resolution of the important issues before it will shape, and indeed preclude, much present and future litigation, and would thereby conserve scarce resources. See also *United States* v. *Powell*, 330 U.S. 238, 240 (1947) ("The cases are here on petitions for writs of certiorari which we granted because of the importance of determining the controlling principle for settlement of the many claims of this character against the Government").[11]

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recompute a decade's worth of GME reimbursements for more than 500 hospitals.

[11] It is important to note that in both *Standard Oil* and *Powell*, this Court ultimately affirmed the decisions of the respective courts of appeals. Thus, the Court's grant of review in those cases was premised on its belief not that the lower court's decision was wrong but that a dispositive ruling on the questions at issue were necessary in light of the frequency with which those questions were arising in the lower courts. See R. Stern, E. Gressman & S. Shapiro, SUPREME COURT PRACTICE 216 (6th ed. 1986). This same

In sum, unless this Court were to conclude that *every* court of appeals will agree with the conclusion reached by the D.C. Circuit in this case, it would disserve the interests of everyone concerned -- the teaching hospitals, HHS, the lower courts, and the public -- to deny certiorari now. The American Hospital Association strongly urges the Court to grant review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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recognition -- irrespective of the merits of the case -- should guide the Court here.